

WEST VIRGINIA BROADBAND DEPLOYMENT COUNCIL

Wednesday, February 15, 2012 @ 9:00 a.m.

The meeting of the West Virginia Broadband Deployment Council was held in Building 6, Room 6A on Wednesday, February 15, 2012, at 9:00 a.m.

The following members participated:

Judge Dan O'Hanlon
Jeff Forbes
Dr. Jan Fox
Michael Kelemen
Lee Fisher (via phone)
Kyle Schafer
Senator Beach
Senator Williams
Ken Arndt (via phone)
Elaine Harris
Erica Mani
Jimmy Gianato

Additional participants:

Andrea Rayl
Doren Burrell
Scott Cosco
Billy Jack Greg
Mark Holmes
John Dunlap
Mark Polen
Jim Nestor
Phil Weikle
Mike Hohn
Greg Florence
Kevin Lazor
LeAnn Shreve
Evelyn Bailey (via phone)
Jim Martin
Chris Morris
Brittany Carnes
Tracy Mallow
Tony Sade
Byron Harris
Secretary Kay Goodwin

Martha McKee
Reverend James Patterson

After a quorum was established, Chair O'Hanlon welcomed the Council and called the meeting to order at 9:00am.

Business

Chair O'Hanlon asked for the approval of the minutes from the January meeting of the Broadband Deployment Council. The Council approved the minutes with no objection.

Other Business

John Dunlap briefed the Council on the progress of the BTOP since the last meeting. Mr. Dunlap stated that all major construction is expected to be completed by October 2012.

Mark Holmes went over the methodologies for determination of Type 1, 2, and 3 unserved areas. Jimmy Gianato asked that the Council have until the next meeting to review the distributed information and vote on the methodology at the March meeting.

Doren Burrell, Counsel for the Broadband Deployment Council, walked through each item in the draft grant rules that were received a substantive comment or objection

2.11. "Underserved Area" means any geographic area where broadband service exists, but where the Council determines that the service is inadequate.

Joseph Starsick, Frontier: "Underserved Areas" should be stricken. Not only is the term broadly ill-defined to mean whatever the Council says it means, but also West Virginia Code § 31-15C-1, *et seq.*, gives the Council no authority over "underserved areas," whatever that term may mean.

Attorney response: The commenter is correct. No such phrase appears in the relevant portions of the Code and this definition should be deleted.

With no objection from the Council this section will be deleted.

2.12. "Unserved Area" means any geographic area without broadband service.

Joseph Starsick, Frontier: The definition of "Unserved Areas," like the other statutorily defined terms, should have the meaning ascribed to it by the Legislature in West Virginia Code § 31-15C-2. It also should include the Type 1, Type 2 and Type 3 unserved areas defined in West Virginia Code § 31-15C-4.

Attorney response: The commenter is correct. The rule should be changed to mirror the definitions from the Code.

With no objection from the Council this section will be changed.

3.2. Identification of protected information in funding applications. Applicants must specifically identify such information in large, conspicuous typeface “CONFIDENTIAL.” Information labeled “CONFIDENTIAL” must also reference the specific subsection of W. Va. Code §29B-1-4 providing protection for that particular content. Any information not marked as confidential may be available for public inspection and copying.

Joseph Starsick, Frontier: Rather than limit the designation to the word “Confidential,” it should include “Proprietary,” “Trade Secret” or other like designations that clearly identify the information as a trade secret. Please note that West Virginia Code § 31-15C-13 explicitly uses the terms “trade secret” and “proprietary.”

Attorney response: This is a good point, although the Code also uses the word “confidential.” The language of the rule should be changed to use the specific words from the Code in the same manner. NOTE: Since there may be other legal reasons why certain information should not be disclosed, the Council may wish to allow applicants to designate such information when it is included, as long as the applicant also states the basis for the claim of confidentiality.

With no objections this section will be changed.

3.3. Determination of Confidentiality.

a. The Council will endeavor to preserve the confidentiality of proprietary business information submitted pursuant to this rule where such information is clearly identified by the applicant.

b. If after review the Council determines that some information fails to qualify as confidential under W. Va. Code §29B-1-4 or these rules, the Council shall promptly notify the applicant. The applicant’s information is subject to potential review by the Council’s legal counsel, the attorney general, and the courts.

c. The Council shall not be liable for the disclosure of any information that it is advised to disclose by the Council’s legal counsel, the attorney general or the courts.

Joseph Starsick, Frontier: This section allows individuals other than authorized officials or employees of the State to have access to trade secret, proprietary or confidential information. This is in direct violation of West Virginia Code § 31-15C-13(b).

Attorney response: Since the ultimate determination of liability is made by the courts, subdivision (c) should probably be deleted.

With no objection this subsection will be removed.

3.4. Authorized Access to Confidential Information. Applications may be reviewed by persons who are not members of the Council as part of the Council’s application evaluation process. Any such individuals shall be required to comply with the Council’s rules regarding the protection of confidential information.

Joseph Starsick, Frontier: This section allows individuals other than authorized officials or employees of the State to have access to trade secret, proprietary or confidential information. This is in direct violation of West Virginia Code § 31-15C-13(b).

Attorney response: The Code actually allows disclosure of confidential information to consultants and agents of the Council. However, the language of the rule should

probably be changed to track the full language of the statute regarding these people.

With no objection this language will be changed.

Chair O'Hanlon asked for a motion to designate Kimball as an agent for the Council which enables them to access this proprietary information. Michael Kelemen made the motion which was seconded by Vice-Chair Mani; the motion passed with no objection. Chair O'Hanlon asked Counsel to draft a non-disclosure agreement between Kimball and the Broadband Deployment Council.

3.5. When a grant application has been submitted to the Council, and the Council submits notice to the Secretary of State pursuant to W. Va. Code §31-15C-10(a), the contents of the application and all application materials shall not be released or disclosed to any member of the public until the sixty-notice period has expired. To comply with notice requirements and to promote competition in the application process, the Council may, however, disclose the name of the applicant, the Type 2 or Type 3 area(s) involved, and a brief description of the project and its benefits.

MJ Johnson: Correct "sixty- notice" to "sixty-day public notice"

Attorney response: Agreed. This typo should be fixed.

Joseph Starsick, Frontier: There is no statutory authority to protect application materials not protected by West Virginia Code § 31-15C-13, the West Virginia Freedom of Information Act or otherwise by West Virginia law. The Council therefore cannot keep confidential during the 60-day period any application materials that are not otherwise protected by law.

Attorney response: The W. Va. Code provides that proprietary information may be protected from disclosure. If the Council determines that information, such as project cost, funding sources, and other financial information, is proprietary *during the period in which competing applications may be submitted*, the Council may withhold this information from disclosure until all applications are filed. **NOTE:** If challenged on this, the final decision would be made by the courts and the Council may be ordered to pay attorney fees if the Court ruled against the Council's interpretation.

Jimmy Gianato moved and Elaine Harris seconded, passed with no objection.

4.4. Applicant Qualifications.

a. Applicants for broadband infrastructure projects must have demonstrated experience in building, operating and maintaining a similar system, or a partner must have that experience.

b. Applicants for demand stimulation projects must have demonstrated qualifications to conduct the type of project they are proposing.

MJ Johnson: There is no definition or description of "demand stimulation." It would seem that "stimulation" could only occur if broadband already existed in the area, so it seems that this would only be an option for Type 1 areas. Also, would the requester of a "demand stimulation" be the existing provider since a new provider would probably require the installation of new infrastructure? A definition would be helpful.

Attorney response: The Code uses the terms “to promote demand” and “stimulation of demand.” It may assist applicants and the public for the Council to include a definition such as this: “demand promotion” means any activity that promotes the demand for broadband services.

With no objection this definition will be added.

4.5. Application.

- a. An applicant shall apply for broadband deployment funds by completing the forms supplied by the Council and providing all required information, certifications and supporting documentation.
- b. The Council may request such additional information as it deems necessary to evaluate any application, including, but not limited to, financial and budgetary information related to the application or to the applicant or to any partners to the application.
- c. Failure to provide such additional information as the Council reasonably requests by a specific date may at the Council’s option disqualify the entire application.
- d. The applicant shall disclose in the application whether the applicant or any project partner has filed for bankruptcy in the preceding eight years. This information shall not constitute a basis for disqualification of the application or less favorable consideration, but may, like any other information in the application, serve as a basis for the Council to request additional information regarding the current operation of the applicant and the nature of other sources of project funding.
- e. The applicant shall disclose whether the applicant or any project partner has ever been subject to a claim, demand, civil action, or administrative action of any kind, for failure to complete, or substantially perform under, a contract or agreement to provide services of the same or similar nature to the services described in the application.
- f. The applicant shall disclose whether the applicant or any project partner has ever failed to meet the conditions of a bond for the performance of services of the same or similar nature to the services described in the application.
- g. The applicant shall describe the cost-effectiveness of the project.
- h. The applicant shall describe the economic development benefits of the project.
- i. The applicant shall provide information concerning the availability of alternative sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding.
- j. The applicant shall demonstrate the long-term financial sustainability of the project.
- k. The applicant shall describe the degree to which the project advances statewide broadband access and other state broadband planning goals.
- l. The applicant shall indicate the date the project is scheduled to commence and the date the project is scheduled to be completed. Projects described in the application shall be entirely complete by the end of the grant agreement term.

- m. If the project requires the construction of broadband network infrastructure, the applicant shall demonstrate its experience operating and maintaining such networks, or any partners' experience operating and maintaining such networks.
- n. The applicant for a broadband infrastructure project shall describe the environmental impact of the project.
- o. The applicant for a broadband infrastructure project shall describe the proposed technologies, bandwidths, upstream data rates and downstream data rates provided by its project.
- p. The applicant for a broadband infrastructure project shall provide proof of compliance with all local, state and federal permitting, licensing and certification requirements necessary for the proposed project.
- q. False or deceptive statements or omissions of any material information in the application may be grounds for denial of the application, the cancellation of any grant to the applicant organization currently or previously approved by the Council, and the disqualification of the applicant and partner organizations, and their representatives, from future grant awards.

Joseph Starsick, Frontier: The application requirements omit several factors that, under West Virginia Code § 31-15C-9 (c), an application explicitly "shall" contain, including such basic information as the proposed location of the project, the type of unserved area, the total cost of the project, the amount of funding assistance required, a demonstration of the need for the project, a showing that the proposed funding is the most economically and viable alternative to completing the project, and a showing how the proposed project compares to alternative proposals for the same unserved area with regard to the number of people served, the amount of financial assistance sought and the long-term viability of the proposed project. Also, the application requirements omit information that Council is statutorily required to consider under West Virginia § 31-15C-9 (a), particularly subsections (5), (6), (7) and (8) of that statute subsection

Attorney response: This is a reasonable request. To the extent that any of the criteria listed in the Code may not be included in this subsection of the rule, the language of the rule should be updated. In addition, it is reasonable to require applicants to provide information relating to subdivisions (5), (6), and (7) of W. Va. Code §31-15C-9(a).

As for including subdivision (8) as a requirement, applicants may not be able to fully comply. The Council could request applicants to provide information relating to "how the proposed project compares to alternative proposals for the same unserved area" to the extent known to the applicants, but because applicants may not know details of competing or alternative proposals, they may not be able to compare their project with other potential projects.

6.4. The Council shall not duplicate or displace broadband service in areas already served or where private industry feasibly can be expected to offer services in the reasonably foreseeable future.

MJ Johnson: It would be helpful to clarify/define "reasonably foreseeable future".

Melissa Livengood: I would like to ask for clarification on "private industry feasibly can be expected to offer services in the reasonably foreseeable future", both Verizon and Frontier told us that they would have DSL out in our area within a year. Neither one ever delivered. I think "reasonably foreseeable future" should be defined with a fixed time period.

Attorney response: Although the term “reasonably foreseeable future” is not defined, there is probably no set period of time that is appropriate for each and every situation. In considering applications, the Council will have to exercise some discretion and judgment to determine the realistic likelihood of the availability of broadband services as to both time and place.

David Hunt: In order to serve an area that does not have service, the network may have to be constructed through areas that have service. The grant rules should define whether the network can or cannot be used to serve subscribers in areas that already have service in order to get to the area that does not have service. I believe that small sections should be allowed.

Attorney response: Although it is likely that an applicant may need to traverse an already served area in order to reach an unserved area and this would provide additional opportunities for the applicants and for consumers, grant funds may not be used to provide broadband service in areas with existing service. The rule should include clear language on this point. Also, application and grant materials should give notice that funds may have to be segregated so that grant funds are only used for projects in unserved areas.

Dr. O’Neil, NRAO: I would like to strongly urge the council to **strike section 6.4** in its entirety from the emergency rule . . . [and make the rule] apply to both underserved and unserved areas.

Attorney response: Under the Code, the Council has no authority to consider grants for projects in “underserved areas.” The Council may not make this amendment because it would exceed the authority of the Council. (See next comments and response.)

David Hunt: The definition of “already served” needs to set specific transmission rates. From my conversations with residents of West Virginia, who have measured their broadband service, there are areas that have DSL service at rates at or near dial-up service. To be considered served, the rates should be at least the minimum required for obtaining a new grant.

Melissa Livengood: First, when you state “already served”, what exactly does that mean? An area served by one provider, or an area that has some competitive marketing?

Attorney response: The rule defines “unserved areas” and the Council only has the authority to award grants for projects for these areas. If the Council chooses, the rule could include a definition of “already served” to mean areas having “broadband service” as defined in W. Va. Code § 31-15C-2(a)(1).

Since several comments complain of existing service to the public where the actual, daily data rates do not match advertised or declared data rates, the Council may wish to allow consideration of grant applications for projects in areas that are declared to have broadband service, but do not have effective broadband data rates. If so, the rule could have a provision allowing applications with a proviso giving the applicant the burden of demonstrating the deficiency with objective evidence.

Motion made by Michael Kelemen, seconded by Dr. Fox; passed with no objection.

6.7. The Council shall evaluate demand stimulation applications based on the following criteria:

- a. The cost-effectiveness of the project;
- b. The economic development benefits of the project;
- c. The availability of alternative sources of funding that could help finance the project, including, but not limited to, private grants or federal funding and the efforts undertaken to obtain such funding;
- d. The extent to which the project advances statewide broadband access and other state broadband planning goals;
- e. The planned date the project would commence and the planned date the project would be completed;
- f. The amount of financial assistance sought;
- g. The long-term financial sustainability of the proposed project; and
- h. The amount of matching funds provided by the applicant.

MJ Johnson: Consideration should be given to including bullet 6.6d ("applicant's experience operating and maintaining networks") in 6.7

Attorney response: Since projects that seek to promote or stimulate demand are more likely to involve education and marketing, specific engineering experience is not relevant to this type of project. The Council may, however, wish to include "experience in similar or related programs" as a criterion.

MJ Johnson: Consider including bullet 6.6k with some modification; i.e., "how the proposed offering compares with existing offerings and advantages offered." (or something suitable)

Attorney response: This is a reasonable request. The Council may wish to add this criterion to the evaluation of broadband promotion projects.

Joseph Starsick, Frontier: This subsection refers to "stimulus" applications. Nowhere in W. Va. Code § 31-15C-1, *et seq.*, is the Council given authority over "stimulus" projects, whatever that term may mean. That term has no place in the rules.

Attorney response: Yes, the Code does not mention "stimulus," although it does use the phrase "stimulation of demand." Recommend the inclusion of a definition for "demand promotion" as explained under subsection 4.4 above.

No objection from the Council on either comment.

6.10. The funding decisions of the Council shall be final.

Mark Robinson: Item 6.10 states that "[t]he funding decisions of the Council shall be final." As a taxpayer, I do find this alarming. I would find it appropriate that a clause be entered regarding misuse of appropriated funds. If a grantee is found to be in any way misusing (accidentally OR intentionally) funds, the Council will require that the funds be paid back in full alongside a fine for misusing government funding.

Attorney response: The West Virginia Code has separate provisions governing misuse of funds from state grants and there are also Department of Administration rules regarding accounting of grant funds and reporting of appropriate spending. These laws do not need to be repeated here, but they could be referenced in subsection 8.5 with citations if the Council deems appropriate.

No objection from the Council on referencing in subsection 8.5.

§208-1-7. Conflict of Interest

Council members shall comply with W. Va. Code §6B-2-5 and the legislative rules promulgated by the West Virginia Ethics Commission and recuse himself or herself from participation in discussion and voting on any grant application in which there is a conflicting issue.

Joseph Starsick, Frontier: West Virginia Code § 31-15C-3(f) is explicit about the protection of Council members and the scope of that protection regarding conflicting issues. The protections of the statute should be in the Council's rules as well.

Attorney response: The Code has a clear explanation of this. It may be convenient to the public to restate the Code's provision here in the rule as well.

No objection from the Council.

8.4 The expenditure of public funds is governed by guidelines set forth by federal law, the state of West Virginia as well as any existing local purchasing procedures. In all cases, the grantee must follow the most stringent of the federal, state or local purchasing and bidding requirements. Please call the West Virginia Development Office for additional details.

Mark Robinson: [paraphrased] I do not find section 8.5 to be sufficient to address potential misuse of funds. The Council should require funds to be paid back in full, alongside a fine, in such event.

Attorney response: This would exceed the jurisdiction of the Council as defined by the Legislature in the W. Va. Code.

9.5. Grantees shall report monthly. If the grantee fails to submit an acceptable report or audited financial statement within the timeframe designated in the grant award, the Council may take appropriate actions, including suspension of payments, suspension of award, or termination.

Mark Robinson: [paraphrased] I do not find section 9.5 to be sufficient to address potential misuse of funds. The Council should require funds to be paid back in full, alongside a fine, in such event.

Attorney response: This would exceed the jurisdiction of the Council as defined by the Legislature in the W. Va. Code.

Motion made by Elaine Harris to adopt recommendations and draft new copy of rules to be voted on next month, seconded by Jeff Forbes; passed with no objection.

Public Comment

There was no public comment.

Adjournment

The next meeting has been noticed for March 14, 2012, at 9:00 a.m. in Building 6, Room 6A. The call-in number and agenda will be provided prior to the meeting.

With no other business, the meeting adjourned at 10:53 a.m.